

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

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Luis Jimenez,

Plaintiff,

v.

GEICO Secure Insurance Co.,

Defendant.

Case No. 2:23-cv-01290-APG-BNW

ORDER

Before the Court is Defendant GEICO's Motion to Stay Discovery (ECF No. 21). Plaintiff opposed the motion (ECF No. 29), and GEICO replied (ECF No. 30).

I. Background

This case stems from a motor vehicle accident that occurred on May 22, 2017. On that day, Plaintiff Luis Jimenez, hit the vehicle driven by Joseph Wolford, who died after the accident. Plaintiff's policy held a \$15,000.00 per person bodily injury limit. Plaintiff contends GEICO did not tender this policy amount to the estate of the decedent until July 25, 2017. According to Plaintiff, this delay in tender (and the failure to initiate settlement pre-demand) was the direct and proximate cause of the ensuing litigation against Luis Jimenez, resulting in a multimillion-dollar judgment against him. As a result, the instant litigation involves claims against GEICO for Breach of Contract, Breach of the Covenant of Good Faith and Fair Dealing, and Unfair Practices claims.

Defendant has filed a Motion to Dismiss the Amended Complaint, which is currently pending. (ECF No. 13). Defendant now moves to stay discovery pending the decision on the Motion to Dismiss.

II. Legal Standard

The Federal Rules of Civil Procedure do not provide for automatic or blanket stays of discovery because a potentially dispositive motion is pending. *Skellerup Indus. Ltd. v. City of L.A.*, 163 F.R.D. 598, 600-01 (C.D. Cal. 1995).

A court may, however, stay discovery under Federal Rule of Civil Procedure 26(c). Fed. R. Civ. P. 26(c)(1); *Clardy v. Gilmore*, 773 F. App'x 958, 959 (9th Cir. 2019) (affirming stay of discovery under Rule 26(c)). The standard for staying discovery under Rule 26(c) is good cause. Fed. R. Civ. P. 26(c)(1) (the court “may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense,” including forbidding discovery or specifying when it will occur).

The Ninth Circuit has not provided a rule or test that district courts must apply to determine if good cause exists to stay discovery. *Salazar v. Honest Tea, Inc.*, No. 213CV02318KJMEFB, 2015 WL 6537813, at *1 (E.D. Cal. Oct. 28, 2015) (“The Ninth Circuit has not provided guidance on evaluating a motion to stay discovery pending resolution of a potentially dispositive motion, other than affirming that district courts may grant such a motion for good cause.”); *Mlejnecky v. Olympus Imaging Am., Inc.*, No. 2:10-CV-02630, 2011 WL 489743, at *6 (E.D. Cal. Feb. 7, 2011) (“The Ninth Circuit Court of Appeals has not announced a clear standard against which to evaluate a request or motion to stay discovery in the face of a pending, potentially dispositive motion.”).

The Ninth Circuit has, however, identified one scenario in which a district court may stay discovery and one scenario in which a district court may *not* stay discovery. The Ninth Circuit has held that a district court *may* stay discovery when it is convinced that the plaintiff will be unable to state a claim upon which relief can be granted. *See Wood v. McEwen*, 644 F.2d 797, 801 (9th Cir. 1981) (“A district court may limit discovery ‘for good cause’, Rule 26(c)(4), Federal Rules of Civil Procedure, and may continue to stay discovery when it is convinced that the plaintiff will be unable to state a claim for relief.”); *B.R.S. Land Invs. v. United States*, 596 F.2d 353, 356 (9th Cir. 1979) (“A district court may properly exercise its discretion to deny discovery where, as here, it is

1 convinced that the plaintiff will be unable to state a claim upon which relief can be granted.”).¹
 2 The Ninth Circuit has also held that a district court may *not* stay discovery when discovery is
 3 needed to litigate the dispositive motion. *Alaska Cargo Transp., Inc. v. Alaska R.R. Corp.*, 5 F.3d
 4 378, 383 (9th Cir. 1993) (district court would have abused its discretion in staying discovery if
 5 the discovery was necessary to decide the dispositive motion); *Kamm v. Cal. City Dev. Co.*, 509
 6 F.2d 205, 210 (9th Cir. 1975) (same).

7 Based on this Ninth Circuit law, district courts in the District of Nevada typically apply a
 8 three-part test to determine when discovery may be stayed.² *See, e.g., Kor Media Group, LLC v.*
 9 *Green*, 294 F.R.D. 579 (D. Nev. 2013). This Court will refer to this test as the “preliminary peek
 10 test.” The preliminary peek test asks whether (1) the pending motion is potentially dispositive, (2)
 11 the potentially dispositive motion can be decided without additional discovery, and (3) after the
 12 court takes a “preliminary peek” at the merits of the potentially dispositive motion, it is
 13 “convinced” that the plaintiff cannot state a claim for relief. *Id.* at 581. If all three questions are
 14 answered affirmatively, the Court may stay discovery. *Id.* The point of the preliminary peek test
 15 is to “evaluate the propriety of an order staying or limiting discovery with the goal of
 16 accomplishing the objectives of Rule 1.” *Tradebay, LLC v. eBay, Inc.*, 278 F.R.D. 597, 603 (D.
 17 Nev. 2011). Rule 1 provides that the Federal Rules of Civil Procedure should be construed “to
 18 secure the just, speedy, and inexpensive determination of every” case. Fed. R. Civ. P. 1.

19 This Court, however, has found the preliminary peek test to be problematic because it is
 20 often inaccurate and inefficient.

21 First, applying the preliminary peek test does not always lead to “accurate results” in
 22 which the cases that will ultimately be dismissed are stayed and vice versa. This is so for two
 23 primary reasons. In the District of Nevada, a magistrate judge applies the preliminary peek test
 24 and decides whether discovery should be stayed; however, a district judge decides the dispositive

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 26 ¹ The Court interprets both these Ninth Circuit cases as providing one scenario in which it is appropriate to stay
 27 discovery but not the only scenario. *See also Jarvis v. Regan*, 833 F.2d 149, 155 (9th Cir. 1987) (affirming stay of
 28 discovery without discussing whether court was convinced plaintiff could not state a claim before entering stay); *Rae*
v. Union Bank, 725 F.2d 478, 481 (9th Cir. 1984) (same); *Clardy v. Gilmore*, 773 F. App’x 958, 959 (9th Cir. 2019)
 (same).

² The Court notes that these District of Nevada cases are persuasive authority, and the Court is not bound by them.

1 motion. These judges sometimes have different views on the merits of the dispositive motion,
2 leading to discovery being stayed in some cases it should not have been stayed in and vice versa.
3 *See also* Kevin J. Lynch, *When Staying Discovery Stays Justice: Analyzing Motions to Stay*
4 *Discovery When A Motion to Dismiss Is Pending*, 47 Wake Forest L. Rev. 71, 97 (2012)
5 (identifying same issue). Additionally, the test requires the magistrate judge to take a
6 “preliminary peek” (i.e., a superficial look) at the dispositive motion and be *convinced* that the
7 plaintiff cannot state a claim for relief before staying discovery. *Kor Media*, 294 F.R.D. at 583-84
8 (discovery stay inappropriate when there is only “a possibility” defendant will succeed on its
9 dispositive motion; “[g]enerally, there must be *no question* in the court’s mind that the dispositive
10 motion will prevail . . .”). When the preliminary peek test is applied as written, it leads to
11 discovery being stayed in only the simplest, legally baseless cases. For most cases, and certainly
12 complex cases, it is impossible for the Court to do a “preliminary peek” and be *convinced* that the
13 plaintiff cannot state a claim. This is problematic because complex cases, in which discovery will
14 be extremely costly, are the types of cases where discovery stays may be particularly appropriate
15 while a dispositive motion is pending (to accomplish the goals of Rule 1). Nevertheless, the
16 preliminary peek test, applied as written, leads to most motions to stay discovery being denied.
17 Accordingly, the preliminary peek test is not well-suited for sorting which cases will be dismissed
18 (and thus should have discovery stayed) from those cases that will proceed (and thus should *not*
19 have discovery stayed).

20 *Second*, the preliminary peek test is inefficient. As just explained, if the preliminary peek
21 test is applied as written (i.e., the Court must be *convinced* after a superficial look at the
22 dispositive motion that the plaintiff cannot state a claim), it often fails to accurately sort those
23 cases that will be dismissed (and should have discovery stayed) from those cases that will proceed
24 (and should not have discovery stayed). To improve the accuracy of the preliminary peek test
25 (and allow discovery stays in cases in which this Court believes the dispositive motion will be
26 granted), this Court has in the past engaged in a full analysis of the dispositive motion. This takes
27 considerable time and delays providing the parties with a decision on the motion to stay
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discovery.³ It is also an inefficient use of judicial resources because both the magistrate judge and the district judge fully analyze the same dispositive motion. And, even after all this effort, the magistrate judge and district judge may still have different views on the merits of the dispositive motion. *See also* Kevin J. Lynch, *When Staying Discovery Stays Justice: Analyzing Motions to Stay Discovery When A Motion to Dismiss Is Pending*, 47 Wake Forest L. Rev. 71, 101 (2012) (noting that having two different judges decide the dispositive motion and the motion to stay discovery introduces burden and error into the preliminary peek test). In short, doing a full analysis of the dispositive motion may improve the accuracy of the preliminary peek test but it takes significant time, duplicates effort, delays providing the parties a decision on whether discovery is stayed, and may still lead to discovery being inappropriate stayed or allowed to proceed.

This Court believes a better analytical framework exists for determining when motions to stay should be granted. As the Court previously discussed, the Court may grant motions to stay discovery when a dispositive motion is pending if (1) the dispositive motion can be decided without further discovery; and (2) good cause exists to stay discovery. *See Alaska Cargo Transp.*, 5 F.3d at 383 (district court would have abused its discretion in staying discovery if the discovery was necessary to decide the dispositive motion); *Kamm*, 509 F.2d at 210 (same); Fed. R. Civ. P. 26(c)(1) (the Court “may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense,” including forbidding discovery or specifying when it will occur). “The burden is upon the party seeking the order to ‘show good cause’ by demonstrating harm or prejudice that will result from the discovery.” *Rivera v. NIBCO, Inc.*, 364 F.3d 1057, 1063 (9th Cir. 2004). As the Court will discuss in more detail below, good cause may be established using the preliminary peek test, but it may also be established by other factors, not related to the merits of the dispositive motion.

The Ninth Circuit has held that good cause to stay discovery may exist when the movant can convince the Court that plaintiff cannot state a claim. *See Wood*, 644 F.2d at 801 (district court may stay discovery when it is convinced that plaintiff will be unable to state a claim); *B.R.S.*

³ This delay often also creates a *de facto* stay of discovery, which is problematic in and of itself.

1 *Land Invs.*, 596 F.2d at 356 (same). These cases remain valid authority, and litigants may still
2 move for a discovery stay under the preliminary peek test. However, as previously discussed, this
3 will only result in discovery stays in the simplest, legally baseless cases.

4 That said, good cause may exist based on other factors unrelated to the merits of the
5 dispositive motion. In many cases, the movant seeks a stay of discovery to prevent “undue burden
6 or expense.” *See* Fed. R. Civ. P. 26(c)(1). Accordingly, the movant must establish what undue
7 burden or expense will result from discovery proceeding when a dispositive motion is pending.
8 Movants are encouraged to be specific about the realistically anticipated costs of discovery (based
9 on factors such as the complexity of the claim(s) at issue, the number of claims asserted, the
10 number of parties involved in the litigation, the number of witnesses including experts, the
11 volume of documents at issue, etc.). Non-movants opposing a stay of discovery should discuss
12 their position on these same factors. Additionally, though parties opposing a motion to stay
13 discovery carry no burden to show harm or prejudice if discovery is stayed, they are encouraged
14 to discuss any specific reasons why a discovery stay would be harmful (e.g., the case is old and
15 evidence is getting stale, a witness is sick and may die before discovery begins, the public has an
16 interest in the speedy resolution of the issues presented, the claimant’s resources and ability to
17 wait for a judgment, etc.). Ultimately, guided by Rule 1 of the Federal Rules of Civil Procedure,
18 the Court is trying to determine “whether it is more just to speed the parties along in discovery
19 and other proceedings while a dispositive motion is pending, or whether it is more just to delay or
20 limit discovery and other proceedings to accomplish the inexpensive determination of the case.”
21 *Tradebay*, 278 F.R.D. at 603.

22 **III. Analysis**

23 Here, Defendants move to stay discovery based on the preliminary peek test and the good
24 cause test developed by this Court.⁴ As discussed below, this Court is not convinced that Plaintiff
25 cannot state a claim or that Defendant will be successful on its Motion to Dismiss. However, this
26 Court is persuaded that good cause exists to stay discovery.

28 ⁴ The parties are familiar with the arguments, as a result this Court does not repeat them here.

1 At the outset, this Court notes that Plaintiff does not contest the notion that a dispositive
2 motion is pending before this Court which does not require additional discovery for its resolution.

3 Having conducted a preliminary peek, this Court is not convinced that Plaintiff will be
4 unable to proceed with the claims Defendant seeks to dismiss. As discussed above, it is virtually
5 impossible for the Court to be convinced that Defendants will succeed on their motions based on
6 a *preliminary peek*. In addition, as Plaintiff points out, the decision in *Chowning v. Nationwide*
7 *Ins. Co. of Am.*, 2023 WL 2971435, is not binding on Judge Gordon. Moreover, Plaintiff argues
8 that the California law relied upon in the *Chowning* decision has undergone some changes, which
9 may (or may not) impact this Court's reliance or application of *Chowning*. This Court will not,
10 however, provide an in-depth analysis of its evaluation of the motions to dismiss.

11 The district judge will decide the dispositive motion and may have a different view
12 of the merits of the underlying motion. Thus, this court's "preliminary peek" at the
13 merits of the underlying motion is not intended to prejudge its outcome. Rather,
14 this court's role is to evaluate the propriety of an order staying or
limiting discovery

15 *Tradebay*, 278 F.R.D. at 603.

16 Next, this Court employs the good cause test. Defendant articulates discovery will be
17 expensive and time-consuming, involving litigation over the proper scope and various depositions
18 of GEICO out-of-state personnel. Accordingly, Defendant has articulated the kind of harm that
19 will result absent a stay. Ultimately, guided by Rule 1 of the Federal Rules of Civil Procedure,
20 this Court finds it is more just to delay discovery to accomplish the inexpensive determination of
21 the case. *Tradebay*, 278 F.R.D. at 603.

22 **IV. Conclusion**

23 **IT IS THEREFORE ORDERED** that Defendant's motion to stay discovery (ECF No.
24 21) is GRANTED.

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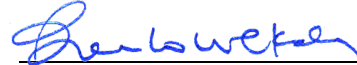
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1 **IT IS FURTHER ORDERED** that the parties are to file a joint, proposed discovery plan
2 and scheduling order within 14 days after the Motion to Dismiss is decided.

3 DATED: November 29, 2023

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6 BRENDA WEKSLER
7 UNITED STATES MAGISTRATE JUDGE
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